



Marine Corps Drill Instructors train enlistees currently part of delayed entry program in Arrowhead Meadows Park, Chandler, Arizona

Fostering Constructive Dialogue on Military Sexual Assault

By LINDSAY L. RODMAN

At a press conference in January 2012, Secretary of Defense Leon Panetta stated that he estimates there were 19,000 sexual assaults in the military in 2011.¹ That number is derived from a statement in the Department of Defense (DOD) *Annual Report on Sexual Assault in the Military, Fiscal Year 2010*.² The report does not actually explain its methodology for arriving at

the number, but it does state the number is based on data from the Defense Manpower Data Center 2010 Workplace and Gender Relations Survey.³ Perhaps more importantly, the report does not refer to 19,000 sexual assaults, but rather 19,000 *reports* by individuals of unwanted sexual contact.

The Defense Manpower Data Center 2010 survey never uses the number 19,000. Rather, the document relays the results

of a survey of 10,029 Active-duty female Servicemembers and 14,000 Active-duty male Servicemembers. The survey itself is forthright and explicit about the numbers it produces and its methodology. The sample size and sample composition necessarily make extrapolation military-wide problematic. The sample was clearly weighted toward female responses, and the definition of *unwanted sexual contact* did not align at all with the colloquial understanding or any statutory or legal definition of *sexual assault*. Nevertheless, the number 19,000 arose as an extrapolation from the numbers in this

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sampling, and this number has pervaded the media discussion ever since.⁴ Most practitioners of justice and criminal investigators throughout the military should agree that the figure cited by Secretary Panetta is unrealistically high.

Inconsistent definitions and an inability to delve into problem definition and problem framing have plagued discussions of sexual misconduct in the military since the days of the Tailhook scandal.⁵ Now, renewed pressure on military commanders has been sparked by an uptick in media attention resulting from Secretary Panetta's statement as well as a new documentary⁶ and a lawsuit filed against DOD and Navy leadership.⁷ Civilian and uniformed military leadership has tended to react to inflammatory stories and inflated numbers without taking a thoughtful, deliberate, and measured approach to the problem. Attention to these matters comes from a genuine desire to make change for the better, but it is not always guided by rational and well-founded information. In more recent months, Members of Congress have petitioned DOD to acquiesce to a human rights inquiry, provide relevant testimony, and most recently to establish a commission to review this problem. While further study is often warranted, there has frequently been a rush to find a solution without properly defining the problem.

Over time, due in part to political pressure, DOD has attacked this sophisticated problem, framed in the wrong way, by simplistically overprosecuting. Current leadership struggles under public pressure to address sexual assault numbers by implementing increasingly draconian policies and sending more military Servicemembers accused of sexual assault through the court-martial process. Secretary Panetta stated during his January 18 press conference that the reason prosecutions are not successful is due in part to insufficient evidence and "aggressiveness" from prosecutors. As a result, DOD leadership has become increasingly frustrated by the lack of results. By seeking to prosecute anyone accused of sexual assault without understanding the source of the underlying problem, leaders are actually contributing to the same cycle of acquittals they seek to avoid. Criminal prosecution is not the answer to resolving many of these reports. Overprosecution only perpetuates the problem because con-

victions are simply not achievable in many of these cases.

Clear-cut accusations against perpetrators that can be proven in court because an investigation yielded admissible and persuasive evidence will almost always result in a guilty plea. Savvy defense attorneys understand when the cards are stacked against the accused,⁸ and they will likely advise their clients to accept a plea negotiation. The difficult cases that cause consternation are the closer calls.

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There are many meritorious and prosecutable accusations of sexual assault in the military. However, this issue has not been treated carefully or with precision. Sound bites and platitudes have detracted from the ability to engage in thoughtful conversation about the actual problem and have therefore prevented thoughtful proposals for solutions. This article aims to illuminate where the conversation has faltered.

The problem plaguing the military is the desire—from commentators, the media, Congress, and even military leadership—for this situation to be a zero-sum game. Either the victim is telling the truth, in which case a conviction should be obtained, or the victim is lying. If a conviction is not obtained, the victim will often complain that he or she was not heard, was not taken seriously, or was made out to be a liar.

Military justice practitioners often see victims who experience real trauma as the result of a sexual encounter, but who would never be able to achieve a conviction in any criminal justice system against the person with whom they had sex. A traumatic sexual encounter may not necessarily be a criminal sexual assault. The inability to obtain a conviction in many of these cases is not the fault of the commander, prosecutor, or military justice system. Rather, it is a problem of expectation and misunderstanding about the capabilities of a criminal justice system. Instead of blaming the military for not taking these allegations seriously,⁹ we should be fostering a more constructive conversation about prosecutorial discretion, alternative accountability measures where appropriate,

and setting realistic expectations, as well as providing counseling and resources to accusers. We should not be revictimizing victims by convincing them that the criminal justice system is an appropriate forum for adjudication, requiring them to undergo scrutiny and multiple rounds of interviews, testimony, and cross examination only to result in acquittals that appear to be referenda on the victim's credibility, integrity, and character.

For better or worse, commanders have attempted to accommodate public pressure to

prosecute in these cases. The accusation that commanders do not take these cases seriously is completely unfounded. The truth is quite the opposite; commanders feel hamstrung to prosecute sexual assaults to the fullest, regardless of the possibility of success at trial. Political pressure from victims' rights groups have created an environment in which Servicemembers are no longer presumed innocent until proven guilty beyond a reasonable doubt, which is a constitutional travesty. Public complaints that the military does not take sexual assault seriously have prompted overprosecution in cases that would likely not go to trial in the civilian world. This creates a vicious cycle of acquittals in the court-martial system, continuing to compound an optics problem in the military.

Empirically, we have more victims than we have criminally convicted offenders. This result is actually an appropriate outcome. There are sexual encounters that result in trauma and produce victims, yet at the same time do not rise to the level of criminality or provability that a rape or sexual assault charge in a felony court would require for conviction.

This article proposes a new lens through which to view sexual misconduct allegations. Civilian colleges and universities have dealt with sexual misconduct allegations for as long as the military has, and there are lessons to be learned from their experiences and practices. After explaining the problem with a prosecution-focused approach, this article proposes a new approach to understanding how we can have victims in cases where convictions are inappropriate.



U.S. Marines with Lima Company, 3rd Battalion, 5th Marine Regiment, conduct census patrol in Sangin, Afghanistan, January 2011

U.S. Marine Corps (Dexter S. Saulisbury)

Nonprosecutable Sexual Assault Allegations

Consider the following hypothetical: two Marines, one male and one female, drink to the point of intoxication at a party. They retire to a barracks room and proceed to have sex. The next day, the female Marine reports a sexual assault. There are no helpful witnesses. The male Marine explains that he believed the sex was consensual.

The criminal justice system—both the civilian and military systems—would most likely not produce a criminal conviction, nor should we want it to. Constitutionally, the

she could only have blacked out—her point of intoxication would not have been enough for her to pass out.¹³ PFC Lamb and Pvt Peterson acknowledged that they had sex but stated that it was consensual. Given the victim's memory lapse, there is no way to know whether the sex was consensual. Both cases resulted in convictions at the trial level, but the Navy-Marine Corps Court of Criminal Appeals reversed the convictions based on the toxicology evidence.

Many attorneys interpret *Lamb* and *Peterson* to create a black out/pass out distinction in courts-martial. The previous

women are sexually assaulted during their tenure in school.¹⁶

The Duke Lacrosse scandal of 2006 is instructive on this point. It was an attempted civilian prosecution of college students for rape in a he-said-she-said scenario. Part of the reason the case achieved so much notoriety was its uniqueness. Aside from the Duke case, prosecutors rarely attempt to achieve a conviction in a civilian court in cases arising from this context. Moreover, in the Duke case, prosecutor Michael Nifong eventually lost his bar license for prosecutorial misconduct due to his overreaching as the case fell apart.¹⁷

Most civilian prosecutors are ethical and understand the limitations of the criminal justice system and thus routinely decline to prosecute these cases. Instead, colleges and universities have developed a variety of administrative forums and procedures for addressing these matters. Alternative dispute resolution, disciplinary boards, and honor boards are just a few of the standard answers to this problem. Higher education institutions have learned over time that the criminal justice system cannot provide a solution for the standard he-said-she-said sexual assault allegation.

In a typical college setting, the 18- to 24-year-old cohort lives together in dormitories in a culture that includes a high incidence of alcohol-facilitated sexual encounters. Similarly, enlisted Servicemembers live in barracks with access to alcohol, and I posit that they tend to drink and have sex with a frequency comparable to their civilian counterparts.

There are no solid statistics for the military or civilian sectors regarding the prevalence of sexual encounters on the whole (consensual or nonconsensual) or sexual assaults among this age cohort.¹⁸ Because there is no way to obtain accurate data on how much sex there is or how many sexual assaults there are in either the college/university setting or military setting, we cannot know whether the military number is greater or lesser than the civilian number. Anecdotally, it seems clear that there are high numbers of victims in both communities who are traumatized by sexual encounters that they do not believe were consensual. A fair argument could be made that we should hold Servicemembers to a higher standard than we do college students; however, it would be unwise to

finders of fact will often find reasonable doubt if they can only consider an incomplete story

accused may only be convicted of a crime if it has been proven, beyond any reasonable doubt, that he or she committed a crime. There is often (but certainly not always) inherent reasonable doubt in a "he-said-she-said" scenario. Alcohol contributes to reasonable doubt by making stories less plausible. If we encourage conviction in that case without more facts, we are infringing on the constitutional rights of the accused.

This hypothetical is not far from the prototypical sexual assault allegation in the military. Many cases also involve memory loss. In most instances, the victim is female and the accused is male. The female victim will often report that she does not remember what happened, or that she only remembers snippets of the sexual encounter. In those cases, convictions are even more difficult to obtain because the finders of fact (a panel of Servicemembers or a military judge¹⁰) will often find reasonable doubt if they can only consider an incomplete story.

Recent case law out of the military appellate courts suggests that even if a conviction is obtained where the victim suffers a memory lapse, the case could be overturned on appeal. In *United States v. Lamb*¹¹ and *United States v. Peterson*,¹² two companion cases, a female Marine private first class (PFC) was invited to drink with two male Marines, PFC Lamb and Private (Pvt) Peterson. Both male Marines had sex with her. The next morning, the victim stated that she passed out and was then sexually assaulted by both PFC Lamb and Pvt Peterson. Her blood draw showed that

version of Article 120 of the Uniform Code of Military Justice (UCMJ)¹⁴ defined *aggravated sexual assault* as a sexual act committed against the victim by placing the victim in fear, causing bodily harm, or committing the act while the victim was "substantially incapacitated." Anecdotally, substantial incapacitation is the most frequently charged type of aggravated sexual assault. (*Rape*, by contrast, is defined in most cases as a sexual act by force. But it can also be charged for rendering the victim unconscious, personally administering a drug or intoxicant causing substantial incapacitation, causing grievous bodily harm, or placing the victim in fear of death, grievous bodily harm, or kidnapping.¹⁵) If the victim can remember bits of the night, as the victim could in *Lamb* and *Peterson*, biologically she was likely not completely passed out. Where a victim has blacked out rather than passed out, a reasonable possibility exists that she had enough capacity to consent at the time of the sexual act. That possibility would preclude conviction beyond a reasonable doubt, and that leads to acquittals, or in these two cases, reversal by the appellate court.

Analogy to the College and University Setting

Colleges and universities face a similar problem of difficult-to-prosecute sexual assault allegations. Rarely, if ever, are college students held criminally accountable for sexual assault. The most cited sexual assault statistics from colleges and universities are 15 to 20 years old, but they typically state that between one in four and one in six college

ignore the experience of these institutions, their similar demographics, and the similar problems they face. Therefore, best practices should be shared between the two communities to provide a more holistic approach to fighting this problem.

Training, Education, and Resources

The military has drastically increased its education and training about sexual assault. Servicemembers are taught to report any sexual encounter in which they feel they were taken advantage of. Specifically, the military teaches women to consider any sexual encounter or contact to which they believed that they did not consent as “rape.”¹⁹ That is not necessarily a bad thing: no woman should be subjected to any sexual contact to which she does not feel she consented. However, the training can be misleading because the term *rape* is a legal term that implies that a conviction for rape could or should result from that encounter.

Training and education are immensely valuable. However, they have to be nuanced enough to distinguish between “rape” or “sexual assault” and “sexual misconduct.” *Sexual misconduct*, as used in this article, includes any sexual conduct in which the victim does not believe she consented, regardless of what can be proven in court. *Sexual assault*, on the other hand, is often colloquially discussed as the conduct captured in sections (a) and (c) of the 2008 version of Article 120 of the UCMJ: “Rape and Aggravated Sexual Assault.”²⁰ As a legal term, *sexual assault* is not clearly defined in the 2008 version of Article 120, but it did become a specific, technical term under the newest 2012 revision.²¹ There may be offensive conduct (for example, unwanted touching) that does not rise to the colloquial understanding of “sexual assault” that might otherwise be properly discussed as sexual misconduct or possibly sexual harassment. Statistics can be misunderstood or inflated by misusing the terminology. Even within DOD, different offices use other definitions of sexual assault that do not align with the statutory landscape. Training within the military—for both leaders and subordinates—about rape, sexual assault, and sexual misconduct is misguided if it does not capture these nuances.

The military has also created institutions and resources for victims of sexual

assault that are unparalleled in civilian society. Sexual Assault Prevention and Response Offices exist in DOD and at each Service and department. These offices coordinate the provision of education and training. They also ensure that every command has a Uniformed Victim Advocate and access to civilian victim advocates who are available as resources for any Servicemember who claims to be the victim of a sexual assault, regardless of whether that allegation can be substantiated. Counselors are provided to victims, and victims can avail themselves of additional mental health resources if they so choose. In addition, Secretary Panetta universalized a policy in his January 2012 press conference that was already in place in some Services including the Marine Corps: all reporting victims will be allowed expedited transfer away from their units. The existence of these resources is immensely important and helps foster a community that encourages healing and provides resources for anyone who is victimized by a sexual encounter. Provision of these services does not and should not hinge on whether the military justice system will produce a conviction in a certain case.

The military also has “restricted reporting,” an opportunity for a victim to avail himself or herself of resources without prompting an investigation or

Quick Primer on the Military Justice System

The military justice system differs from the civilian criminal justice system in a few significant ways. A court-martial trial itself looks remarkably like a civilian trial, with the exception that the jury is replaced by a panel of Servicemembers. The major procedural differences between courts-martial and civilian trials reside in pretrial and post-trial processes.

Unlike in the civilian world, the prosecutor does not own the criminal case; the commanding officer of the accused Servicemember owns the case. It is up to the commander to determine what forum is appropriate for addressing the misconduct; that is, whether to choose administrative punishment of some kind, a misdemeanor-type “special court-martial,” or a felony-type “general court-martial.”²³

Rape or sexual assault prosecutions are appropriately tried at a general court-martial. To refer a case to a general court-martial, the charges must be vetted by an impartial officer who is either a judge advocate or field-grade officer.²⁴ In practice, these investigations, codified in Article 32 of the UCMJ, are almost always conducted by a judge advocate so legal expertise can be applied to the analysis.²⁵ These investigations are intended to provide a hedge against prosecutorial

to refer a case to a general court-martial, the charges must be vetted by an impartial officer

prosecution. However, it is difficult for a Servicemember to submit a restricted report without making a mistake that would convert the submission to an “unrestricted report,” that is, one that prompts investigation. Restricted reporting can only be communicated to a chaplain, medical professional, or victim advocate or counselor.²² Consequently, when a Marine confides in his or her best friend about a sexual encounter, that friend is obligated under military order to disclose the communication to the command. Many investigations begin when a roommate reports on behalf of another Servicemember. While that is beneficial in some cases, in other cases it forces the victim into a role he or she has not chosen and does not want, that of an accuser.

misconduct and overreaching, much like the grand jury system in Federal criminal courts.

After thoroughly investigating the misconduct, the Article 32 investigating officer will write a report providing recommendations to the commander about how to dispose of the case. Typically, the first commanding general in the accused’s chain of command has the authority to convene a general court-martial. The commanding general will only decide on how to proceed after receiving advice from his or her staff judge advocate (SJA), a judge advocate assigned to the commanding general’s staff as a legal advisor.²⁶

Despite this robust vetting process, commanding officers and commanding generals often neglect to heed the advice of their legal advisors—the prosecutor, the Article 32

officer, and/or the SJA—and push forward on sexual assault cases that lack merit at trial. They do so because they fear they will be perceived as taking the accusations lightly.

Facts Drive Outcomes

The problem in these cases is the facts. They often cannot be developed fully enough to achieve proof beyond a reasonable doubt, as illustrated above by the alcohol-induced he-said-she-said hypothetical. When a prosecutor does not have good facts, conviction cannot be the expectation. Nor should we want there to be a conviction in many of

“taken into account” during the process. In 2012, Article 120 was revised again, but it does not appear that the revision will renew focus on the victim or address these concerns. Rather, some commentators believe that the focus on the offender is even stronger in the new version.²⁸

Using Tort Law “Negligence” to Understand the Problem

The disconnect between a victim’s trauma resulting from a sexual experience and the inability to obtain a conviction is a large contributor to the perception of a

tal must result. Again, this is appropriate; the Constitution demands it, and the penalties for a guilty finding are severe.

In reports of sexual assault, we often see victims who were harmed through negligence or recklessness. In an aggravated sexual assault case that hinges on substantial incapacitation, even if the victim cannot show that she was passed out beyond a reasonable doubt, it may be that she was intoxicated enough that the accused was reckless or negligent in pursuing sex with her. The accused may have acted in a way that does not meet the level of care that we want Servicemembers to have for one another, but perhaps the accused was not malicious. A tort outlook may be a more appropriate framework with which to approach analysis of sexual misconduct.

By using the negligence framework, we can capture the category of cases that involve a victim who believes he or she was taken advantage of, but where a prosecutor cannot prove beyond a reasonable doubt at trial that there was *force* (rape) or *substantial incapacitation* (aggravated sexual assault) under the 2008 statutory framework. If the accused caused harm to the victim, the harm is still real. The accused may even have done something morally wrong under the circumstances. But it may not have been a crime.

A Negligence Discussion Only Begins to Frame the Problem

The problem with using the tort paradigm is that it drives seemingly unacceptable solution sets. The necessary consequence of using tort language is that it suggests lawsuits are the answer. Neither military leaders nor victim advocates are likely to accept an argument that we should encourage Servicemembers to sue each other over harms that result from sexual encounters.³¹ The hope in introducing this paradigm is not to encourage lawsuits but merely to reframe the analysis.

The criminal law framework used to address sexual assault allegations in the military continues to be ill-equipped to handle many cases. Colleges and universities appear to have abandoned criminal law as a tool for this reason, except in the most clear-cut circumstances. Instead, these institutions pursue a host of alternative adjudicative tools to address the problem. No one argues that these solutions in col-

those cases. That would require a standard below the “beyond a reasonable doubt” standard, creating an exception in criminal law for sexual assault cases in direct contravention of the Constitution.

Some victims have expressed frustration at the inability of commands to obtain convictions, or even to pursue investigations in their cases. Some of this criticism unfairly targets processes that are necessarily not victim-focused. Criminal investigations are focused on the accused. If the investigating law enforcement agency can identify the accused, its job is to investigate impartially to provide whatever evidence it can to the commander so he or she can decide whether to prosecute. By law, victims are kept informed of the progress of the investigation, and their preference is considered, but it will never be dispositive, nor should it be.

Similarly, prosecutions themselves should not be victim-focused. The military sexual assault statute, Article 120 of the UCMJ, underwent substantial revision in 2008. The revision was intended in part to take the focus away from the victim in order to protect him or her.²⁷ The question before the trier of fact is based on whether she was *forced* by the accused, and not whether she consented. The ironic consequence of that revision is that what was going through the victim’s head at the time, or her subsequent trauma, is irrelevant to the question of guilt. Perhaps in part for that reason, victims can often believe that they were not “heard” or

“sexual assault problem” in the military. The problem is actually in large part a tort problem. However, the tort paradigm is inherently problematic for addressing sexual assault. Therefore, despite being analytically more appropriate, both the military and civilian worlds have been reluctant to discuss sexual assault with tort terminology.

A *tort* is a harm inflicted by one party against another. Torts are the subject of civil lawsuits. When one party believes that another has behaved negligently or recklessly with regard for another, and harm is inflicted, the harmed party can sue and collect in court for the value of the harm. In cases where a sexual assault allegation might not result in a conviction, the complaint may have resulted from a harm inflicted by a Servicemember, perhaps due to lack of due care (negligence) or even recklessness regarding the victim’s desire to participate or level of intoxication. Nevertheless, it may not achieve the level of criminality or intent required for a rape or sexual assault conviction.

If consent is an issue at trial (that is, where the accused argues that the victim consented, not that sex did not occur), a sexual assault conviction can be achieved only where the government has proven *beyond a reasonable doubt* that the victim did not consent or that the accused was not reasonably mistaken that he or she consented.²⁹ In other words, if the finder of fact at court-martial believes it is possible that the accused reasonably *believed* the victim consented (even if she did not),³⁰ an acquit-

*if the finder of fact believes it is possible
that the accused reasonably believed the victim consented,
an acquittal must result*

leges and universities have eliminated the problem. However, the solution imposed on the military—encouragement to prosecute questionable cases and be more “aggressive”—has our leadership going in the wrong direction entirely. For those who believe that the military does not prosecute to the fullest, going farther down the path of pursuing more prosecutions in more cases will not achieve the desired outcome of more convictions. It may end up doing more harm than good by failing to manage the expectations of victims and forcing them through a frustrating process.

Recent Developments

Aside from encouraging more prosecution, recent developments in law and policy may change the landscape somewhat in sexual assault cases. First, Congress passed a revision to Article 120 of the UCMJ that became effective on June 28, 2012. One major change in the new statute is that the accused will face a “knew or should have known” standard about whether the victim was incapacitated. Results from cases arising under these statutes should just be starting to come in as this article is published. Nevertheless, legal analysts have begun to consider the 2012 revision, and some point out that the should-have-known standard applied in incapacitation sexual assault cases actually appears to create a negligence (or possibly recklessness) standard, leading to the belief that the landscape will change with application of the new law. However, the new law merely requires the government to prove that the accused knew or should have known that the victim was incapacitated, whereas the old law did not have a knowledge requirement. Under the old statute, the finders of fact were charged with determining whether they believed the victim was substantially incapacitated regardless of what the accused understood. Therefore, although the change looks like it embraces “negligence,” the new approach actually may make conviction even harder by requiring the government to prove more than before; moreover, it does not address the overarching problems with the old statute. The new Article 120 will not capture those cases in which the accused’s general decision-making lacks due care for the perspective of the victim.

Another significant change to Article 120 is the revocation of the affirmative defense of consent, which created an unneces-

sarily complicated legal landscape. The term *substantially incapacitated* has also been replaced with “asleep, unconscious, or otherwise unaware that the sexual act is occurring,” or situations in which a drug or intoxicant renders the victim incapable of consenting. Although these changes will move the inquiry further away from a victim-focused question of consent, questions of force or incapacitation and consent will always be inextricably intertwined. Finally, the definition of *sexual assault* will include a broader definition of sexual conduct and sexual acts, thus potentially enabling more prosecutions in cases that do not involve sexual intercourse (and potentially making it a target for constitutional overbreadth challenges).

These changes help tidy up the language of an unwieldy and complicated statute, but they will likely not affect many of the problematic scenarios discussed above. The issue boils down to proving, beyond all reasonable doubt, that the victim did not consent or did not have the capacity to consent, especially in cases where alcohol and memory lapses are involved. The new revision may allow more convictions at the margins (though it may result in fewer as well), but it is not likely to be a panacea.

commanders, hopefully this will result in a culture where the decision not to prosecute in certain cases comes with credibility and faces less criticism.

General Martin Dempsey published his *Strategic Direction to the Joint Force on Sexual Assault Prevention and Response* on April 30, 2012. Although the document highlights the importance of this matter to the highest ranking leaders within the military, it does not present new or novel approaches to the issue. It merely recommits the joint force to existing programs and policies.

Within the Marine Corps specifically, the commandant spent the spring and early summer of 2012 on a “Heritage” tour, asking Marines to honor their traditions, behave morally, and hold each other accountable for their missteps. In his brief, the commandant described the distrust that Members of Congress and the public have in commanders, manifested to him directly, and their skepticism that Marine Corps leadership takes these issues seriously. This lack of faith in the genuine efforts of leadership has the potential to drive bad policy outcomes.

The commandant also cited a “sexual assault” statistic of 343 reports in 2011, though he defined “sexual assault” to include

the issue boils down to proving, beyond all reasonable doubt, that the victim did not consent or did not have the capacity to consent

Another major policy development was the release by Panetta of a Secretary of Defense Memorandum on April 20, 2012, that withholds disposition authority of sexual assault cases to the O-6 level. This memorandum requires some commanding officers, who would otherwise have the authority to decide whether to prosecute certain cases, to obtain the decision from their higher headquarters. Most sexual assault case disposition decisions are made at the flag-officer level, so this memorandum may not affect that decisionmaking process greatly. However, it indicates that the senior levels of DOD leadership continue not to trust the commanders making disposition decisions. The hope is that by elevating the rank of those empowered to decide, the decisions will carry more weight with outside observers. Therefore, despite the lack of faith that this policy change exhibits in lower-level

everything from unwanted touching to forcible sexual intercourse, as well as allegations that were later unsubstantiated. This figure, despite being derived from an overly broad definition of “sexual assault,” also serves to contextualize how problematic the 19,000 extrapolation is. Any sexual assault is one sexual assault too many, but if the goal is to have a targeted and productive discussion about the actual problem in order to derive corresponding solutions, the discourse has certainly not gotten there yet.

The commandant has decided to reorganize the Marine Corps legal community to facilitate better oversight, supervision, and mentorship. With the creation of Regional Trial Counsel Offices, the Marine Corps will have a vastly improved means of surging capability and expertise to strategic and complex cases, especially sexual assault cases, wherever they arise. The new construct gives

the Marine Corps flexibility and a better ability to pair the appropriate experience and ability level with the appropriate case. However, what these initiatives cannot do is change the facts or the law: prosecution of many sexual assault cases will continue to be an uphill battle.

Conclusion

The next step in addressing this problem is to embrace the existence of a gray area. To approach the problem constructively, we must acknowledge that a report from a victim will not achieve a conviction every time. Certain cases produce victims through sexual encounters that lead to trauma due to nonconsent or uncertainty about consent. Sometimes those same cases should not or cannot result in criminal convictions, either due to evidentiary issues or just the level of certainty—proof beyond a reasonable doubt—required to achieve a conviction. Even in a straightforward blackout case in which a woman consented while intoxicated to the point of memory loss, but not to the point that she passed out or was otherwise incapacitated, there could easily be trauma. It is likely terrifying to wake up next to someone without knowing how one got there and whether that person is trustworthy. It may require therapy and support for a victim to come to terms with what happened under those circumstances. In many of those cases, however, no crime occurred or no crime can be proven beyond a reasonable doubt. We should still encourage those victims to avail themselves of every resource. They should have advocates and therapists and be able to move away from the source of their trauma. However, commanders should not be criticized for their inability to obtain convictions, or even their decision not to prosecute in many of those cases.

A sophisticated understanding of the capacities of criminal law, including its strengths and weaknesses, will hopefully help bring the conversation about the military “sexual assault problem” away from blaming commanders for not taking the problem seriously because they are not obtaining convictions. If we perpetuate the cycle of unsuccessful prosecutions, no one wins. Victims are dragged through a process that can only traumatize them more without achieving their desired endstate: accountability for the harm done to them. At the same time, the accused has to endure a highly stressful

court-martial process and is made out to be a pariah when he or she may not have done anything criminal.

We do not need to deny the victimization or trauma of the accuser in order to acknowledge that prosecution is inappropriate in many instances. Using a negligence paradigm, perhaps both military and civilian leadership can come to appreciate that there are many instances in which a sexual assault allegation is made but no conviction would result: the gray area. In those cases, much like in civil cases, despite the unlikelihood of successful prosecution, there is a clear, articulable harm that results to a victim. Embracing that gray area should help shift the focus of the conversation away from the current self-perpetuating cycle of encouraging further prosecution to address a frustrating conviction rate. Colleges, universities, and civilian prosecutors routinely decline prosecution in these gray area cases. Yet civilian leadership seems to expect military commanders to approach this common problem differently.

The military is being asked to be better than society at large, which the military should strive to be. However, the expectations associated with such a request must be reasonable and achievable. As we strive to be better, we should focus on ensuring that victims are provided with treatment and resources, managing expectations about the capacity of the criminal justice system, and limiting criticism of military commanders who genuinely care, but cannot achieve convictions in many cases. **JFQ**

NOTES

¹ Department of Defense (DOD) News Briefing with Secretary Leon Panetta from the Pentagon, Washington, DC, January 18, 2012, available at <www.defense.gov/transcripts/transcript.aspx?transcriptid=4959>.

² *Annual Report on Sexual Assault in the Military, Fiscal Year 2010* (Washington, DC: DOD, March 2011), 97, available at <www.sapr.mil/index.php/annual-reports>.

³ Defense Manpower Data Center, *Workplace and Gender Relations Survey of the Active Duty Members* (Washington, DC: DOD, March 2011), available at <www.sapr.mil/index.php/research>.

⁴ For the numbers to work out according to their math, this extrapolation necessarily requires that half of those victims (up to about 10,000) would be male, which anecdotally seems questionable.

⁵ In 1991, at an event at the Las Vegas Hilton attended by the naval aviation community, 83 female and 7 male military Servicemembers were groped, sexually harassed, and sexually assaulted by as many as 100 other Sailors and Marines. When reported, the event turned into a scandal and forced the military to confront questions about a culture of hostility toward women in the military in the media and in multiple congressional hearings.

⁶ *The Invisible War*, produced by Kirby Dick and Amy Ziering, has screened at various film festivals. The Web site for the film is <<http://invisiblewarmovie.com/>>.

⁷ The complaint was filed in Federal district court in Washington, DC, and is on file with the author and available at <<http://msnbcmedia.msn.com/i/TODAY/Sections/Today%20People/2012/03/20-%20March/Klay%20complaint.pdf>>.

⁸ In the military justice system, the term *accused* is used where the term *defendant* is usually used in the civilian justice system.

⁹ See, for example, *The New York Times* editorial “Sexual Violence and the Military,” March 8, 2012, available at <www.nytimes.com/2012/03/09/opinion/sexual-violence-and-the-military.html>.

¹⁰ “Members panels” in the military justice system take the place of a civilian “jury.”

¹¹ *United States v. Lamb*, 2010 CCA LEXIS 334 (N-M. Ct. Crim. App. 2010).

¹² *United States v. Peterson*, 2010 CCA LEXIS 336 (N-M. Ct. Crim. App. 2010).

¹³ The term *black out* refers to an alcohol-induced memory lapse, whereas *pass out* refers to loss of consciousness. Often the person who either blacks out or passes out would not be able to discern the difference. Other witnesses or evidence would be necessary to make the distinction.

¹⁴ 10 U.S.C. § 920 has been amended. The new changes went into effect on June 28, 2012. The *Lamb* and *Peterson* cases were tried under the 2008 version of the statute.

¹⁵ 10 U.S.C. § 920 (2008). 10 U.S.C. § 925 (Article 125 of the Uniform Code of Military Justice [UCMJ]) also criminalizes forcible sodomy, another type of sexual assault. For simplicity’s sake, I refer mainly to Article 120 cases, but Article 125 cases face similar hurdles to Article 120 cases.

¹⁶ See National Institute for Justice (NIJ), *The Campus Sexual Assault Study*, NIJ Grant No. 2004-WG-BX-0010, October 2007; *One in Four*, a list of sexual assault statistics compiled with citations, is available at <www.oneinfourusa.org/statistics.php>.

¹⁷ “Nifong Will Be Disbarred for Ethics Violations,” Associated Press, June 18, 2007, available at <<http://nbcports.msnbc.com/id/19264396/>>.

¹⁸ Even the Federal Government has trouble achieving reliable statistics on this question. In *The Sexual Victimization of College Women* (Washington, DC: Department of Justice, December 2000),

Bonnie S. Fisher, Francis T. Cullen, and Michael G. Turner describe the problem of achieving reliable numbers. The study attempts to measure the problem and arrives at roughly 35 instances of sexual assault per 1,000 college women. Study available at <www.nij.gov/pubs-sum/182369.htm>.

¹⁹ This statement is based on my own anecdotal experiences at various trainings and during interactions with victims in my capacity as a judge advocate.

²⁰ 10 U.S.C. § 920 (a)-(d) (2008).

²¹ What used to be called “aggravated sexual assault” is now simply called “sexual assault,” thus simplifying the terminology.

²² Deputy Secretary of Defense Directive-Type Memorandum, Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009), March 16, 2005.

²³ Misdemeanor-type crimes and uniquely military offenses are typically tried in special courts-martial. Administrative punishment could be the result of a summary court-martial or non-judicial punishment.

²⁴ 10 U.S.C. § 832 and *Manual for Courts-Martial United States* (Washington, DC: DOD, 2008), Rule for Courts-Martial 405.

²⁵ In the Army, by contrast, line officers (as opposed to judge advocates) often serve as Article 32 investigating officers.

²⁶ 10 U.S.C. § 834.

²⁷ See James G. Clark, “‘A Camel Is a Horse Designed by Committee’: Resolving Constitutional Defects in Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses,” *The Army Lawyer*, July 2011, 3.

²⁸ James G. Clark, “2012 UCMJ Article 120, effective 28 June 2012,” 2012 Emerging Issues 6423, available at <[www.jagcnet.army.mil/852577C1004877F2/0/CD7859AC835EC94A85257A2B004F57D4/\\$file/2012_Emerging_Issues_6423__Clark_on_2012_UCMJ_Article_120.pdf](http://www.jagcnet.army.mil/852577C1004877F2/0/CD7859AC835EC94A85257A2B004F57D4/$file/2012_Emerging_Issues_6423__Clark_on_2012_UCMJ_Article_120.pdf)>.

²⁹ 10 U.S.C. § 920 (r) & (t)(14)-(16).

³⁰ Throughout this article, I use male and female pronouns in reference to both the accused and the victim. However, “he or she” can be cumbersome and distract from the meaning within a given sentence. In those cases, I default to the most common scenario: a male accused and a female victim. I do not mean to exclude any cases in this discussion, and I apologize for the exclusion and the oversimplification where it occurs.

³¹ See, for example, The National Crime Victim Bar Association, *Helping Crime Victims Pursue Civil Justice*, available at <www.victimsofcrime.org/our-programs/national-crime-victim-bar-association/case-law>.



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Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach

By Mark E. Redden and Phillip C. Saunders

The United States and China have a complex, multifaceted, and ambiguous relationship where substantial areas of cooperation coexist with ongoing strategic tensions and suspicions. One manifestation involves disputes and incidents when U.S. and Chinese military forces interact within China’s Exclusive Economic Zone (EEZ). Three high-profile incidents over the last decade have involved aggressive maneuvers by Chinese military and/or paramilitary forces operating in close proximity to deter U.S. surveillance and military survey platforms from conducting their missions. Why do these incidents continue to occur despite mechanisms designed to prevent such dangerous encounters? Could new or different procedures or policies help avoid future incidents?

According to authors Mark Redden and Phillip Saunders, if U.S. policymakers seek a change in Chinese behavior, they need to understand the underlying Chinese policy calculus, how it may change over time, and potential means of influencing that calculus. U.S. policymakers have several broad avenues of approach to alter the Chinese policy calculus and thereby influence Chinese behavior, but given the importance that China places on sovereignty, no single option is likely to be sufficient. A mixed approach, particularly one that influences a larger number of Chinese decisionmakers, may maximize the probability of success. Cooperative approaches require time for the benefits of cooperation to accrue and for normative arguments to be heard and heeded, both in China and internationally.



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